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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KATHLEEN A. KENNE, Plaintiff and Respondent, v. ZELMA R. STENNIS et al., Defendants and Appellants.	B215859 (Los Angeles County Super. Ct. No. SC100219)

APPEAL from an order of the Superior Court of Los Angeles County. Norman P. Tarle, Judge. Affirmed.

Schomer Law, Scott Schomer; Law Office of Helaine Hatter and Helaine Hatter for Defendants and Appellants.

Kathleen A. Kenne, in pro. per., for Plaintiff and Respondent.

* * * * * *

In this appeal from the denial of a special motion to strike under Code of Civil Procedure section 425.16, the "anti-SLAPP statute,"[1] respondent originally sued appellants for attorney fees and then settled the case with appellants. Respondent then sued appellants for breach of the settlement agreement and fraudulent transfer of property to thwart the settlement. Appellants moved to strike the second complaint under section 425.16. The trial court denied the motion on the ground that appellants failed to demonstrate that the claims against them arose from activity protected under the statute. We agree and affirm the order denying the motion. We also deny sanctions requested by both parties.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Kathleen A. Kenne, an attorney, represented appellant Zelma R. Stennis, an elderly widow, for approximately two years in unlawful detainer actions. On February 13, 2007, respondent sued Zelma and her son, appellant Kevin P. Stennis, also an attorney, to collect her fees and costs (first action). On September 11, 2007, respondent and Zelma entered into a "Conditional Settlement Agreement and General Release" (settlement agreement), which by its terms was intended "to settle all of the issues" in the first action. The settlement agreement provided that certain properties owned by Zelma, which were then in escrow, would be sold by a certain date and respondent would be paid directly from the escrow proceeds. The settlement agreement was executed outside of court but later filed with the court on September 17, 2007.

While the first action was pending, respondent filed the instant action on October 16, 2008 against Zelma, Kevin, and Kevin's wife, attorney M. Helaine Hatter, asserting three causes of action: (1) Breach of the settlement agreement against Zelma,

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[1] SLAPP is an acronym for strategic lawsuits against public participation. An order granting or denying a special motion to strike under section 425.16 is directly appealable. (§ 425.16, subd. (i); § 904.1, subd. (a)(13).)

Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

seeking specific performance; (2) common counts against Zelma and Kevin for $393,091.64; and (3) fraud against Zelma, Kevin and Helaine, alleging that on December 13, 2007 and July 17, 2008, Kevin and Helaine fraudulently transferred Zelma's real properties to Kevin in violation of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.) (UFTA). The third cause of action alleges that the transfers were made for the purpose of "rendering Zelma Stennis insolvent and judgment proof for purposes of any judgment obtained against her" in the first action, and that the "fraudulent transfers were made without consideration, and were done with the specific intent and design to defraud plaintiff and other creditors." The instant action was deemed related to the first action, but the two cases were not consolidated for trial.

Appellants filed a motion to strike the instant complaint under section 425.16, which respondent opposed. The trial court denied the motion, finding that appellants failed to show the claims arose out of activity in furtherance of appellants' rights of petition or free speech. The trial court noted: "The 'gravamen' of this action is not any conduct [occurring] during settlement negotiations, or any alleged fraud that 'occurred' when the underlying settlement agreement between the parties was signed, but the post-settlement failure to perform the terms of the settlement agreement, and alleged fraudulent transfers of assets." In reaching its conclusion, the trial court ruled that the parties' evidentiary objections and requests for judicial notice were moot, as unnecessary to the court's analysis of the first prong of the anti-SLAPP motion.[2] Appellants' motion for reconsideration was denied. This appeal followed.[3]

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[2] On May 10, 2010, we granted the parties' requests to take judicial notice of certain records.

[3] The parties agree that while the appeal of the instant case was pending, the first action proceeded to a jury trial in which respondent was awarded $177,215 on a common count against Zelma, and Zelma was awarded $50,000 for breach of fiduciary duty by respondent.

DISCUSSION

I. The Anti-SLAPP Statute and the Standard of Review.

The anti-SLAPP statute is aimed at curbing "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738–739.) The statute provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An act "'in furtherance of'" the right of petition or free speech includes "any written or oral statement or writing made before a . . . judicial proceeding"; "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body"; "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"; or "any other conduct in furtherance of the exercise of the constitutional right of petition . . . of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(1)–(4).)

There are two components to a motion to strike brought under section 425.16. Initially, the party challenging the lawsuit has the threshold burden to show that the cause of action arises from an act in furtherance of the right of petition or free speech. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Once that burden is met, the burden shifts to the complaining party to demonstrate a probability of prevailing on the claim. (*Zamos v. Stroud, supra,* at p. 965; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) To satisfy this prong, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000)

78 Cal.App.4th 562, 568 [to establish a probability of prevailing, a plaintiff must substantiate each element of the alleged cause of action through competent, admissible evidence].) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We independently review the record to determine whether the asserted causes of action arise from the defendant's free speech or petitioning activity, and, if so, whether the plaintiff has shown a probability of prevailing. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.)

II. Respondent's Claims Do Not Arise from Protected Activities.

Appellants contend that the three causes of action in the instant case are "a result of retaliation" against them for opposing respondent's three attempts to enforce the settlement agreement in the first action. We disagree.

To support their contention, appellants point to three minute orders in the first action pertaining to respondent's motions to enforce the settlement agreement and enter judgment pursuant to section 664.6. In the first minute order, dated November 29, 2007, the court denied respondent's motion without prejudice. In the second minute order, dated February 14, 2008, the court determined that the settlement agreement related only to payments from escrow, and not from "other sources" as stated in the retainer agreements, and again denied the motion without prejudice. In the third minute order, dated May 15, 2008, the court treated respondent's "second renewed" motion to enforce the settlement agreement as a motion for reconsideration, and denied it on procedural grounds because it did not comply with the mandatory requirements of section 1008. On appeal, respondent repeatedly argues that the merits of the settlement agreement were

never reached in the first action, and that she has every right to try to enforce the terms of that agreement in this action.

Whether the merits were reached in the first action is not relevant to the first prong of the anti-SLAPP analysis here. As our Supreme Court has explained: "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78.) "'"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." [Citation.]'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478.) "The principal thrust or gravamen of the claim determines whether section 425.16 applies." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472; *Martinez v. Metabolife Internat., Inc*. (2003) 113 Cal.App.4th 181, 188.)

It is not enough to show that the action was *triggered by* or filed *in response to* or *in retaliation for* a party's exercise of free speech or petitioning rights. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 89.) "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*City of Cotati, supra*, 29 Cal.4th at pp. 76–77.) "[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. [Citation.] That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. To focus on City's litigation tactics, rather than on the substance of

City's lawsuit, risks allowing Owners to circumvent the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP *arise from* protected speech or petitioning." (*Id*. at p. 78.) As Division One of our district recently noted: "In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint without being a basis of liability." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.)

None of respondent's three causes of action in the instant complaint is based on appellants' prior litigation or petitioning activities. The breach of contract and common count claims do not mention the first action for legal fees and costs. Even assuming Zelma's entering into the settlement agreement in the first action was a protected activity under section 425.16, respondent's contract claims arise from the alleged failure of Zelma to perform under the terms of the parties' written settlement agreement. "[D]efendant's subsequent alleged breach of the settlement agreement . . . is not protected activity because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant's right of petition or free speech, as those rights are defined in section 425.16." (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118.)

Nor have appellants demonstrated how respondent's third cause of action for fraudulent transfers of real property under the UFTA falls within protected activity of the anti-SLAPP statute. Appellants assert in their opening brief that "the entire cause of action arises from the court denying Respondents [sic] CCP § 664.4 motions to enforce the settlement agreement," but they do not explain the connection between any protected activity on their part and respondent's claim for fraudulent transfer of property. While the allegedly illegal transfers may have been evidenced by the filing of deeds with the county recorder's office, it is not the *filing* of the deeds or any related documents that forms the basis of respondent's third cause of action. Rather, it is the acts of transferring

the assets for allegedly improper purposes that form the bases of the third cause of action. A fair reading of the allegations of the complaint leads to the conclusion that such transfers were carried out to protect appellants' economic interests, and not to further their constitutionally protected petitioning or speech activities.

Other cases support our conclusion. In *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, the Wangs entered into a contract to sell two parcels of land to Wal-Mart while retaining two adjacent parcels. Instead of seeking to have a street relocated to provide the Wangs with continued access to their parcels, as the parties had discussed, Wal-Mart obtained a city resolution to vacate the street and replace it with an emergency vehicle easement and truck alley. (*Id*. at pp. 795, 797.) The Wangs sued for breach of contract, fraud and other causes of action. Wal-Mart filed an anti-SLAPP motion contending all of the allegations in the complaint arose from its protected petitioning activity in obtaining city development permits. (*Id*. at pp. 793–794.) In reversing the trial court's order granting the motion, the appellate court concluded that the overall thrust of the complaint challenged the manner in which the parties privately dealt with one another and that Wal-Mart's pursuit of governmental approvals was merely collateral or incidental to those private dealings. (*Id*. at p. 809.) The court found that a fair reading of the allegations of the complaint led to the conclusion that the acts complained of were carried out by Wal-Mart in furtherance of its economic interests in implementing the contractual agreement and not in furtherance of First Amendment rights. (*Id*. at pp. 807, 809.)

In *Marlin v. Aimco Venzia, LLC* (2007) 154 Cal.App.4th 154, landlords filed and served notice under the Ellis Act (Gov. Code, § 7060 et seq.) of their intent to remove units from the rental market. Tenants of the units sued for declaratory and injunctive relief, challenging the landlords' right to invoke the Ellis Act to evict them and seeking a declaration of their rights under the act. The landlords brought an anti-SLAPP motion, contending the tenants' suit arose from its filing and serving the Ellis Act notices. The appellate court was willing to assume the filing and service of the notices constituted protected free speech or petitioning activity, but concluded that the landlords failed to

show the suit arose from any act in furtherance of its right of petition or free speech. The court reasoned that filing an action after the service and filing of the notices, which constituted protected activity, did not mean the claim arose from or was based on those protected activities. (*Marlin, supra*, at p. 160.) "[T]he cause of plaintiffs' complaint was [the landlords'] allegedly wrongful reliance on the Ellis Act as their authority for terminating plaintiffs' tenancy. Terminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech." (*Id*. at pp. 160–161.) "[T]he [plaintiffs'] suit is not based on defendants' filing and serving of a notice required under the Ellis Act, it is based on the [plaintiffs'] contention 'defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home.'" (*Id.* at pp. 161–162.)

In *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, the city's rent control board believed that certain forms a landlord had filed with the board were part of a scheme to evade the city's rent control law and nearly triple the rent for two of the landlord's apartments. The board sued the landlord for declaratory and injunctive relief, seeking a judicial determination of the maximum allowable rent for the two apartments. The landlord filed an anti-SLAPP motion contending the board was attempting to punish it for seeking redress of government through means of the rent control process established by the ordinance for increasing the rental rate of an apartment. (*Id*. at p. 1315.) In reversing the trial court's order granting the motion, the appellate court assumed that the landlord's filing of the forms necessary to obtain a rent increase was a protected petitioning or free speech activity and that it may have "triggered" the board's lawsuit. (*Id*. at p. 1318.) But the court held that the lawsuit was not based on the filing of such papers, but on the board's claim that the landlord was charging an illegal rent. (*Ibid.*)

Appellants' reliance on *Navellier v. Sletten, supra,* 29 Cal.4th 82 to support their position is misplaced. There, the plaintiffs sued the defendant in federal court for breach of fiduciary duty in connection with the defendant's mismanagement of an investment company started by the plaintiffs. During the federal action, the parties entered into an

agreement that included a release of most claims. When the plaintiffs subsequently amended their complaint in the federal action, the defendant filed counterclaims. The plaintiffs ultimately obtained dismissal of the two of the counterclaims based on the release. (*Id*. at pp. 85–87.) While the federal action was pending, the plaintiffs filed a state action alleging that the defendant "had committed fraud in misrepresenting his intention to be bound by the Release, so as to induce plaintiffs to incur various litigation costs in the federal action that they would not have incurred had they known [the defendant's] true intentions." (*Id*. at p. 87.) The plaintiffs also alleged that the defendant "had committed breach of contract by filing counterclaims in the federal action." (*Ibid*.) The defendant filed an anti-SLAPP motion, which the trial court denied and the appellate court affirmed.

Our Supreme Court reversed, holding that the plaintiffs' claims arose from protected activity. The fraud claim was based on the defendant's "negotiation, execution, and repudiation of the Release" which "limited the types of claims that [the defendant] was permitted to file in the federal action," and the "plaintiffs relied on the Release" when they moved to dismiss the defendant's counterclaims. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 90.) Thus, the defendant's "negotiation and execution of the Release . . . involved 'statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body.'" (*Ibid*.) The plaintiffs' breach of contract claim involved protected activity because it was based on the defendant's filing of his counterclaims in the federal action. (*Ibid*.) In other words, the Court concluded that "but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Ibid*.)

By contrast here, respondent's contract claims do not seek recompense from appellants for positions they took in the first action regarding the settlement agreement. Nor does respondent allege any fraud in the inducement in entering into the settlement agreement. Rather, the claims seek enforcement of the terms of the settlement agreement. The gist of these claims "is not that defendant did something wrong by acts committed during the course of the underlying . . . action, but rather that defendant did

something wrong by breaching the settlement agreement . . . ." (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc., supra*, 164 Cal.App.4th at p. 1118.) Similarly, respondent's fraud claim is not based on any activity taken in furtherance of appellants' rights of petition or free speech in the first action. Rather, this claim is based on allegedly fraudulent transfers of real property for improper purposes. Such alleged conduct is not protected constitutional activity.

Nor is there any merit to appellants' cursory assertion in their opening brief that respondent also filed the instant action in retaliation for appellants' activities in the first action of requesting a mandatory fee arbitration and stay and opposing respondent's filing of several lis pendens. There are no allegations in the form complaint mentioning these activities or any other allegations that even raise the specter of these issues.

The trial court properly concluded that appellants failed to meet their initial burden of showing that respondent's causes of action arose from protected activities. Accordingly, it is unnecessary for us to address the second prong of the anti-SLAPP analysis of whether respondent can show a probability of prevailing on her causes of action.

III. The Parties' Requests for Sanctions.

Both parties request sanctions against the other. We deny these requests.

Section 907 states: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (See also Cal. Rules of Court, rule 8.276(a).)[4] "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no

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[4] Rule 8.276(a) of the California Rules of Court provides that an appellate court may impose sanctions on a party or an attorney for: "(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal's determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules."

merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.)

Appellants seek sanctions against respondent for her failure to return the copy of the record she borrowed from appellants. California Rules of Court, rule 8.153, requires a party to lend its copy of the record to a party that has not purchased the record and makes a written request, and requires the borrowing party to return the record when it files its brief. Appellants seek $5,500 as "necessary to pay for the replacement costs and damages such as the record, reporters [sic] transcripts, inconvenience of drafting and filing the motion [for sanctions], contacting court reporters, paying for running and having to make some copies of the original court file of the record." Appellants argue that respondent's failure to return the record was "done out of retaliation and harassment to hinder Appellants' from writing a reply brief." They deny respondent's claims that she left a banker's box containing the record outside the office of appellants' counsel and that appellants have more than one copy of the record.

Respondent, on the other hand, seeks $29,566 in sanctions against appellants, which she claims represents her reasonable attorney fees and costs. She contends that sanctions are justified because the appeal is both subjectively and objectively frivolous. She argues that it is subjectively frivolous because it was intended solely to harass her and to delay this appeal, the trial in the first action, a trial on the merits of the instant action, and the first amended complaint with additional causes of action that respondent plans to file in the instant case. She points out that appellants obtained three separate extensions of time to file their opening brief on appeal, and that they repeatedly filed requests and motions on the eve of filing deadlines. She also points out that appellant Zelma Stennis is 88 years old, and asserts that Zelma's son and daughter-in-law are waiting for her to die. Finally, respondent points out that appellants "over-designated" the record, which consists of 14 volumes of clerk's transcripts amounting to more than 3,300 pages, in violation of California Rules of Court, rule 8.276(a)(2), which requires

the record to be limited to matters reasonably material to the appeal's determination. She asserts that appellants deliberately expanded the record to delay its preparation.

Respondent argues that the appeal is objectively frivolous because no reasonable attorney would conclude that her simple form complaint with its three causes of action for breach of contract and fraud falls within the anti-SLAPP statute. She suggests that if appellants were convinced of the merits of their appeal, they would have filed their opening brief months before they finally did under threat of dismissal by this court.

The parties' dislike of one another is abundantly clear from their briefings and the record, and it comes as no surprise that they would each seek sanctions against the other. Although it is arguable that appellants have deliberately dragged out this appeal, we decline to award sanctions to anyone on this appeal for the simple reason that it appears all parties have committed some wrongdoing. Respondent did not return the copy of the record she borrowed from appellants when she filed her brief, in violation of rule 8.153(b) of the California Rules of Court. But even a cursory review of the 29-page index of the record as designated by appellants reveals that they included numerous matters not remotely material to the appeal's determination, in violation of rule 8.276(a)(2) of the California Rules of Court. Indeed, of the 200 or so entries on the index, less than a quarter are relevant to this appeal, and respondent's opposition to the anti-SLAPP motion does not appear until volume seven of the record. [5]

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[5] In a single sentence in their August 23, 2010 motion for sanctions, appellants ask us to declare respondent a vexatious litigant pursuant to section 391. We deny this request.

Appellants' September 14, 2010 supplemental request for judicial notice in support of monetary sanctions includes several matters of which we previously took judicial notice. To the extent the supplement request includes additional matters, we deny the request to take judicial notice of these matters.

DISPOSITION

The order denying appellants' anti-SLAPP motion is affirmed. Respondent is entitled to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ